FARAD CONTINUATION SHEET NO.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5383 OF 2005

Office notes, office Memoranda of appearances, Court's orders or directions & Registrar's orders.	: Coram, : : : :	Court's or Judge's Orders .

Mr. Anil Singh for the petitioner.

Ms. Sukeshi Bhandari for respondents 1 to 15.

CORAM: SMT. RANJANA DESAI, J.

DATED: 18TH AUGUST, 2005.

P.C.:-

The petitioner is original defendant 2 in S.C. Suit No.1915 of 2003. It appears that in I.E. & C. Suit No.219/234 of 2002 filed by the petitioner, the Small Causes Court passed a decree in terms of the consent terms, pursuant to which defendant 2 got possession of the suit premises. Respondents 1 to 15 filed S.C. Suit No.1915 of 2003 for declaration that the decree dated 10/10/2002 passed by the Small Causes Court in I.E. & C. Suit No.219/234 of 2002 is illegal and null and void

as the same is obtained fraudulently.

Admittedly, respondents 1 to 15 have also filed an application under Order XXI, Rule 99 of the Civil Procedure Code (for short, "the CPC") complaining of the dispossession. That application is pending. In S.C. Suit No.1915 of 2003, the petitioner/defendant 2 raised issues regarding maintainability of the suit. The issues raised by defendant 2 were whether the suit was maintainable in view of a proceeding taken out by the plaintiff in executing court and whether on proper application of Section 47 of the CPC read with Order XXI, Rules 99 to 103, the suit would not be maintainable. The trial court by its order dated 23/12/2004 held that the suit is maintainable. The said order is challenged in this petition.

I have heard the learned counsel for the petitioner. He strenuously contended that respondents 1 to 15 having filed an application under

Order XXI, Rule 99, they could not have filed S.C. Suit No.1915 of 2005 and such a suit is not maintainable. In support of his contention, the learned counsel relied on the Supreme Court judgment in **Prasanta Banerji v. Pushpa Ashoke Chandani & Ors., JT 2000 (7) SC 502** and Full Bench judgment of the Karnataka High Court in **V.K. Rama Setty v. A. Gopinath, AIR 1998 Karnataka 186**.

I am not impressed by his submissions. In **Silverline Forum Pvt. Ltd. v. Rajiv Trust & Another, (1998) 3 SCC 723,** the Supreme Court has considered the scope of adjudication under Order 21, Rule 97 of the CPC. The Supreme Court observed that when a decree holder complains of resistance to the execution of a decree, it is incumbent on the executing court to adjudicate upon it and the words "all questions arising between the parties to a proceeding on an application under Rule 97" would envelop only such questions as would legally arise for

determination between those parties. The Supreme Court further observed that the questions which the executing court is obliged to determine under Rule 101, must possess two adjuncts. First is that such questions should have legally arisen between the parties and the second is, such questions must be relevant for consideration and determination between the parties. It was further observed that the executing court can decide whether the resister or obstructor is a person bound by the decree and he refuses to vacate the property.

In my opinion Order 21, Rule 97, would not cover challenge to the decree on the ground that it is obtained fraudulently and, therefore, it is a nullity. The remedy of a person who takes up this contention is to file a suit for setting aside the said decree and such an objection cannot be entertained during the course of execution proceedings. It is well settled that an executing

court cannot go behind the decree, nor can it question its legality unless it is shown that it was passed by a court inherently lacking jurisdiction. The trial court, therefore, cannot be faulted for holding that the suit is maintainable.

The judgment of the Supreme Court in **Prasanta Banerji's case (supra)** is not applicable to the present case because the question which the Supreme Court was dealing with in that case was whether the suit filed by the appellant who was not party to the decree is maintainable when execution proceeding in respect of the same property has been initiated under Order 21, Rule 97 of the CPC or whether his remedy is going in the said execution proceeding. The facts of the present case can be distinguished from the facts before the Supreme Court. Besides, no reasons have been given by the Supreme Court. Even the judgment of the Full Bench of the Karnataka High Court in **V.K. Rama Shetty's case (supra)** does

not help the petitioner. The Full Bench has not considered the question whether a suit challenging the decree on the ground of fraud is barred if application under Order 21, Rule 99 is pending. In this connection, reliance placed by the learned counsel for respondents 1 to 15 on the judgment of this court in **M/s. West Coast Paper Mills Ltd. v. The Trustees of the Port of Bombay & Ors., 1993 (3) All M.R. 73** is apt.

In view of this, in my opinion, the trial court has rightly held that the suit is maintainable. No interference is necessary. Petition is dismissed.

(SMT. RANJANA DESAI, J.)